

FEDERAL COMMUNICATIONS COMMISSION
WIRELINE COMPETITION BUREAU

Petition for Declaratory Ruling of Mediacom)	
Communications Corporation Pursuant to)	WC Docket No. 14-52
Section 1.2(a) of the Commission's Rules)	
)	

COMMENTS OF IDAHO POWER COMPANY

Idaho Power Company ("Idaho Power") submits these Comments regarding Mediacom Communications Corporation's ("Mediacom") Petition for Declaratory Ruling Pursuant to Section 1.2(a) of the Commission's Rules ("Petition") in the above-captioned proceeding. The Wireline Competition Bureau of the Federal Communications Commission ("FCC" or "Commission") sought comments on the Petition in an April 8, 2014, Public Notice. Mediacom's Petition requests that the Commission issue a declaratory ruling that an indemnification clause in a pole attachment agreement is not just and reasonable under Section 224 of the Communications Act of 1934 if it contains asymmetrical and nonreciprocal indemnification provisions. While the underlying facts in the case describe an unfortunate accident that resulted in a fatal injury to a Mediacom employee, ultimately, the Petition to the Commission is a contractual dispute between two corporations.

Idaho Power is a utility with service territory in Idaho and Oregon. Idaho Power owns and maintains over 400,000 distribution and 50,000 transmission poles, with over 60 pole attachment agreements governing approximately 150,000 attachments of telecommunications equipment to Idaho Power owned poles. Idaho Power complies with FCC guidance regarding such attachments, as implemented by the Idaho Public

Utilities Commission ("IPUC") and the Public Utility Commission of Oregon ("OPUC"). While both the IPUC and OPUC have declared that they regulate joint use within their respective states as allowed under 47 U.S.C. § 224(c), Idaho Power is concerned that the broad-reaching policy changes, such as those requested by Mediacom in this case, may impact state regulations.

Mediacom's Petition requests that the Commission issue a declaratory ruling that indemnification clauses in pole attachment agreements must be symmetrical and reciprocal in order to be just and reasonable under the Communications Act. Idaho Power asserts that non-reciprocal indemnification provisions are a proper way to mitigate the risk created by attaching entities, particularly where parties have differing levels of risk and other provisions cannot be negotiated. Mediacom's Petition focuses its arguments on the non-reciprocal nature of the allocation of fault in the contract at issue, wherein Mediacom agreed to indemnify the pole owner regardless of fault of either party. Notably, Mediacom makes no allegation and sets forth no facts asserting that it could not have negotiated an indemnification clause that was limited to instances where Mediacom's actions triggered the duty to indemnify.

Idaho Power does not object to a requirement in pole attachment agreements that indemnification is based upon fault or proportionate fault of a party; however, Mediacom requests that any indemnification clause be deemed unjust or unreasonable if it contains *any* asymmetrical and non-reciprocal provisions. The broad nature of Mediacom's request implies that all portions of an indemnification clause must be reciprocal, and fails to account for asymmetrical and non-reciprocal indemnifications provisions that also allocate fault to a party who causes potential liability. Non-

reciprocal and asymmetrical indemnification provisions are appropriate because pole owners and attaching entities have differing levels of risk when entering into pole attachment agreements.

Indemnification clauses are an important way for pole owners to manage the risk of having outside entities attach to their facilities, particularly in light of mandatory access requirements at rates set by commission formulas. Indemnification clauses typically prevent pole owners from defending claims or incurring damages caused by attaching entities and eliminate the need to incur costs, such as insurance, to account for risks related to the attachment of telecommunications equipment to its poles. Indemnification clauses do not need to be reciprocal to be just and reasonable when one party owns facilities and the other party uses them. In such an instance, it is commercially reasonable and mitigates risk to have the attaching entity indemnify the pole owner for claims, losses, or damages it causes to the facilities. A pole owner takes on significant additional risk by allowing other entities to attach to its facilities; an attaching entity takes on minimal, if any, additional risk by attaching to a pole owned by another party. In such a circumstance, the owner of the pole has increased risk due to the attachment and a non-reciprocal indemnification clause is appropriate to reduce that risk.

In non-regulated areas, the rate for use of a company's facilities would take into account variables such as reduced or increased risk due to negotiated indemnification or liability provisions in an agreement. Pole attachment agreements differ in this regard because: (1) the pole owner must enter into the agreement and (2) the rates for this mandatory access are set by formulas proscribed by this Commission or state utilities

commissions. These formulas do not account for the increased risk a pole owner takes on by its requirement to allow access to attaching entities. It is inappropriate to require utilities to accept increased risk and increased costs to insure against the risk created by reciprocal indemnification clauses, particularly in contracts that are mandatory and with set rate formulas. Such a combination of factors creates a situation where increased risk for attaching entities' wrongdoing is shifted to the pole-owning utility and its ratepayers. Non-reciprocal indemnification clauses under these circumstances are an appropriate tool to pass on the cost of mitigating or insuring against risk to the entity which causes the risk.

As described above, Idaho Power respectfully requests that the Commission deny Mediacom's Petition for a declaratory ruling because non-reciprocal indemnification provisions are appropriate in regulated pole attachment agreements.

Respectfully submitted this 8th day of May 2014.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of May 2014 I served a true and correct copy of the within and foregoing COMMENTS OF IDAHO POWER COMPANY upon the following named parties by electronic mail:

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